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CASE NO. 92-868

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

REPUBLIC INSURANCE GROUP, ET AL.,
Petitioners,

v.

CYNTHIA M. MALESKI, ACTING INSURANCE COMMISSIONER OF THE COMMONWEALTH OF PENNSYLVANIA AS REHABILITATOR OF THE MUTUAL FIRE, MARINE AND INLAND INSURANCE COMPANY,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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REPLY ARGUMENT

I. THIS COURT HAS JURISDICTION TO REVIEW PETITIONERS' CONTRACT CLAUSE CLAIMS

This case involves the unconstitutional impairment of Petitioners' contractual rights of setoff imposed by a plan of rehabilitation for an insolvent Pennsylvania insurance company, Mutual Fire, Marine and Inland Insurance Company ("Mutual Fire"). Respondent claims that the issue of Republic's setoff rights is just a matter of interpretation of state law which is not

within the Court's jurisdiction to consider. Brief in Opposition at 9-10. This is obviously incorrect as the issue before this Court is that the Pennsylvania Supreme Court has interpreted a state statute in a manner which infringes upon Petitioners' constitutional rights under the Contract Clause. Clearly, this is within the court's authority to review. *See Energy Reserves Group v. Kansas Power & Light*, 459 U.S. 400, 411 (1983).

Respondent then argues that this Court lacks jurisdiction to review Petitioners' Contract Clause claims simply because Petitioners did not introduce into evidence below specific setoff clauses from Petitioners' reinsurance contracts with Mutual Fire. Brief in Opposition at 15-16.[1] This is a meritless argument. Respondents acknowledge that Petitioners timely and properly raised below their constitutional claims and that the lower court ruled against them on these claims. Moreover, Respondents do not dispute that Petitioners introduced evidence below showing that their contracts with Mutual Fire contain setoff clauses and they did not dispute the existence of those contractual rights in the court below. *See* Opposition Brief at 15-18; Republic Petition at 2 n.2 and the citations therein; Brief for Appellee at 95-98, *Foster v. Mutual Fire, Marine & Inland Insurance Co.*, 1992 WL 210948 (Pa. Aug. 21, 1992). That is all that is required for this Court to have jurisdiction.[2] Supreme Court Rule 14.1(h);

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1. Respondent also accuses Petitioners of selective editing of one of these contract provisions discussed in Petitioners' certiorari petition. Brief in Opposition at 16. This is patently incorrect because the entire clause is appended to Republic's petition, while the relevant portion is quoted in the petition. Republic Petition at 2-3; App. G at G-4 - G-5.

Respondent then argues that the terms of this contract provision allow for abrogation of the right of setoff in the case of an insolvency. Respondent fails to mention that New York's highest court has interpreted New York Insurance Law § 7427 (referred to in the clause as predecessor Section 538) as allowing the same setoff rights petitioners have invoked in this insolvency. *In re Midland Insurance Co.*, 590 N.E.2d 1186, 1191-1192 (N.Y. 1992). Indeed, the New York court resoundingly affirmed that reinsurers have the right to setoff mutual debts and credits with a company in liquidation. *Id.* In light of New York's construction of its statute, Petitioners could not have anticipated Respondent's denial of Petitioners' bargained for contract rights.

2. The only case cited by respondent in support of her position is inapposite. *See National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe*

28 U.S.C. § 1257(a); *North Carolina R.R. Co. v. Zachary*, 232 U.S. 248 (1914) (Supreme Court has jurisdiction to review constitutional claim where lower court considered and denied constitutional challenge); *see Orr v. Orr*, 440 U.S. 268 (1979); *Lear, Inc. v. Adkins*, 395 U.S. 653, 657 n.1 (1969).

II. THE PENNSYLVANIA SUPREME COURT DID NOT FOLLOW *NEBLETT V. CARPENTER*

In *Neblett v. Carpenter*, 305 U.S. 297, 305 (1938), this Court held that a plan of rehabilitation must accord creditors at least the equivalent rights and value for their claims as they would have received in a liquidation. The Mutual Fire rehabilitation plan fails to meet these requirements because in a liquidation Petitioners would have been allowed the right to setoff mutual debts and credits, without limitation, as mandated by 40 P.S. § 221.32. *See* Republic Petition at 10-13. The Respondent seeks to avoid the rehabilitation plan's constitutional infirmity and the lower court's error by the sophistry of admitting that *Neblett* applies but then contending that the lower court properly followed *Neblett*. Opposition Brief at 11-15.

While the Pennsylvania court's decision is confusing, it is clear that it selectively ignored *Neblett* and did not apply it correctly. *Foster*, 1992 WL 210948, at *7, App. A at A-11 – A-15. In those instances where 40 P.S. § 221.32(a) would have benefited the Petitioners, the lower court found the statutory setoff section inapplicable and held that setoff was a matter of common law. *Foster*, 1992 WL 210948, at *8, App. A at A-15. Where the statute, however, benefited the Rehabilitator, insofar as it denied petitioners the right to offset premiums owed to Mutual Fire, the court found it applicable. *Id.* at 9, App. A at A-15 – A-16. Under Neblett, the Pennsylvania statute must fully apply in this rehabilitation, regardless of who benefits. *See*

Ry. Co., 470 U.S. 451, 472 (1985). It only sets out the test for deciding a Contract Clause challenge and says nothing about requiring that specific pieces of evidence have to be introduced below for this Court to have jurisdiction to review a Contract Clause claim. *Id.*

Neblett, 305 U.S. at 305. Certiorari should be granted on this issue of national importance and summary reversal or vacatur ordered, if not set for plenary review. See Supreme Court Rule 10.1(c).

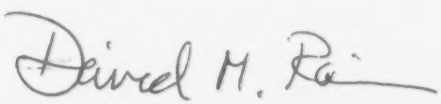
III. THE EVIDENCE BELOW SUPPORTS PETITIONERS' CLAIMS REGARDING THE NATIONAL IMPORTANCE OF THE ISSUE OF SETOFF

In alleging that the issue of reinsurer setoff is not of national importance, Respondent selectively quotes from the testimony of a witness whose testimony was put forth by certain other reinsurers (these reinsurers also seek certiorari). Brief in Opposition at 10-11. Respondent, however, fails to quote those parts of Mr. Bell's testimony which were contrary to her position. Mr. Bell testified that setoff is "an absolutely necessary tool as far as reinsurance is concerned" and that the rehabilitation plan's setoff provision "would create havoc" with reinsurers. Transcript of Hearing on Plan of Rehabilitation at 479, 491. Thus, Mr. Bell's testimony supports Petitioners' arguments, and those of proposed *amicus* Reinsurance Association of America ("RAA"), concerning the national importance of the setoff issue before this Court. *See* Republic Petition at 8-10; RAA *Amicus Curiae* Brief.

CONCLUSION

The Petition for a Writ of Certiorari of Republic Insurance Group, et al. should be granted.

Respectfully submitted,



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